DEC 20 1954
HAROLD B. WILLEY, Clerk

No. 460

Supreme Court of the United States

OCTOBER TERM, 1954

FREEDA CAROLINE MILLER,
also known as FREEDA MILLER, *Appellant*,

v.

PUBLIC SERVICE COMPANY OF COLORADO, a corporation; THE DISTRICT COURT OF ADAMS COUNTY; and CHRISTIAN D. STONER, one of the judges thereof, *Appellees*,

APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

MOTION TO DISMISS AND SUPPORTING MEMORANDUM

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APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

MOTION TO DISMISS AND SUPPORTING MEMORANDUM

COMES NOW the appellee, Public Service Company of Colorado, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States and moves the Court to dismiss the above case on the following grounds:

1. The appeal is not within the jurisdiction of this Court because there has been no final judgment by the

state court as is required by 28 U. S. Code, Section 1257(2); and

2. The appeal does not present a substantial federal question.

I.

THIS APPEAL IS NOT FROM A FINAL DECISION OR DECREE OF THE STATE COURT.

Appellee, Public Service Company, which is a public utility under Colorado law, instituted an eminent domain proceeding in the Colorado State District Court for the purpose of condemning certain described farm land owned by appellant Miller. The petition, filed in accord with Colorado law, stated that the said lands were necessary for the construction of a huge steam electric generating plant, and that the generating plant was necessary because of the demands of the utility's customers which include many instrumentalities of the United States government. It was prayed by the electric public utility, appellee, that the trial court set the case for hearing and trial, that compensation be determined, and that the said land be appropriated to the public use as aforesaid. The electric utility did not ask for possession pendente lite even though such is permitted by Colorado law.

The land owner, appellant Miller, filed five motions in the trial court. Included in these five motions were two motions to dismiss. A motion to dismiss performs and serves the same function under the new Colorado Rules of Civil Procedure as did the old demurrer. One of the motions to dismiss asserted that the Colorado eminent domain statute under which the appellee, Public Service Company, was proceeding was "unconstitutional."

The trial court overruled the motions to dismiss and held the act constitutional, and the land owner, Miller, immediately sought review by certiorari of this interlocutory ruling by the Colorado Supreme Court. That appellate court on review held the statute constitutional and remanded the case to the District Court "in order that the proceedings as instituted in the trial court may go forward." *Miller* v. *Public Service Co. of Colorado,* — Colo. —, 272 P. 2d 283 at 287 (1954).

It is important to note that appellant, Miller, requested the appointment of a body of commissioners to determine the necessity for the taking, and demanded a jury trial on the question of compensation to be paid for the taking. Both of these motions were confessed or granted, but before the trial court could appoint commissioners to determine necessity or before a jury could be empaneled to determine compensation, these appellate proceedings seeking fragmentary review were begun as aforesaid. It must be emphasized that the only decision made by the Colorado court thus far is the overruling of the motions to dismiss.

Appellant's right to appeal rests upon 28 U. S. Code Sec. 1257(2), and review by this Court is thereby limited to final decisions of the state courts. Clearly the Colorado court has not rendered a final judgment, and this appeal must, therefore, be dismissed. This Court held in *Catlin* v. *United States,* 324 U. S. 229, that orders entered in condemnation proceedings were not appealable prior to a determination of compensation. On page 233 Justice Rutledge in rendering the opinion of the Court said:

> "....ordinarily in condemnation proceedings appellate review may be had only upon an order

> or judgment disposing of the whole case, and adjudicating all rights, including ownership and just compensation, as well as the right to take the property. This has been the repeated holding of decisions here. The rule applies to review by this Court of judgments of state courts, in advance of determination of just compensation, although by local statute 'judgments of condemnation', i.e., of the right to condemn particular property, are reviewable before compensation is found and awarded."

The case of *Grays Harbor Logging Co.* v. *Coats-Fordney Co.*, 243 U. S. 251, is a precedent exactly in point. That was an eminent domain case which arose under the Washington statutes, which provided that there should be first a hearing on necessity and then a hearing on damages. After the first order was entered, but before the determination of compensation had been made, the Grays Harbor Logging Company obtained a review by the Washington Supreme Court which rejected the contention that the statute in question was unconstitutional. The appeal to this Court was dismissed for want of a final judgment. This Court held that an order for condemnation was merely interlocutory until the amount of the damages or award had been settled; and that at that later time the federal question could be raised even though the state court should treat its first case as res judicata.

Appellant in an effort to bring this matter within the purview of certain prohibition cases appealed to this Court, states contrary to fact at page 2 of the Statement as to Jurisdiction that this proceeding was instituted in Colorado to obtain a Writ of Prohibition. Colorado has effectively abolished writs of prohibition.

Rule 106(a) of the Colorado Rules of Civil Procedure provides that writs of prohibition, as heretofore known, are abolished, and Rule 116 of the Rules provides that relief in the nature of prohibition will never be granted "except in matters of great public importance." The decision appealed from shows on its face that this case was not at that time considered to be a matter of great public importance.

In recent years the Supreme Court of Colorado has had occasion to review the interlocutory rulings of the trial court in eminent domain proceedings. It has always been careful to state that the proceeding was not prohibition, but was merely a review of the record in the nature of certiorari. *Swift* v. *Smith*, 119 Colo. 126, 201 P. 2d 609 (1948); *Potashnik* v. *Public Service Co.*, 126 Colo. 98, 247 P. 2d 137 (1952).*

Under Colorado law there is an unbroken line of authority that the denial of a motion to dismiss in an eminent domain proceeding such as is involved in this case is interlocutory and quite definitely not final. *First National Bank of Greeley* v. *Minnesota Mines, Inc.*, 109 Colo. 6, 121 P. 2d 488 (1942); *Burlington & C. R. Co.* v. *Colorado Eastern R. Co.*, 45 Colo. 222, 100 Pac. 607 (1909). In determining the question of the finality of the state judgment here, resort to the local law may be made in order to resolve what effect the judgment has under state practice. *Richfield Oil Corporation* v. *State Board of Equalization*, 329 U. S. 69; *Brady* v. *Terminal R. Asso.*, 302 U. S. 678, 688;

* After the decision in the Potashnik case the legislature of the State of Colorado amended the Eminent Domain Act to provide for the condemnation of lands for electric generating stations by public service corporations. It is pursuant to the provisions of this amended act that this action was instituted in the trial court, and it is, of course, this same act which the Colorado Supreme Court held to be constitutional and valid in all respects.

Brady v. *Southern R. Co.*, 319 U. S. 777. See Boskey, *Finality of State Court Judgments under the Federal Judicial Code*, 43 Col. L. Rev. 1002, 1005 (1943).

Furthermore this Court has held repeatedly that a judgment or decree of a state court which remands the case to the trial court for further proceedings, as was done in this case, is not a final judgment and will not be reviewed by the Supreme Court of the United States. *Schlosser* v. *Hemphill*, 198 U. S. 173; *Joslin Mfg. Co.* v. *Providence*, 251 U. S. 535; *Prudential Ins. Co.* v. *Cheek*, 252 U. S. 567. The face of the judgment is the test of its finality. *Schlosser* v. *Hemphill*, 198 U. S. 173; *Louisiana Nav. Co.* v. *Oyster Commission*, 226 U. S. 99; *Carondelet Canal & Nav. Co.* v. *Louisiana*, 233 U. S. 362; *Gulf Ref. Co.* v. *United States*, 269 U. S. 125.

Here the Colorado Supreme Court has merely affirmed an order overruling a motion to dismiss. Quite obviously the finality requirements of 28 U. S. Code Sec. 1257(2) have not been complied with. *Kalb* v. *Luce*, 305 U. S. 566. This is true, of course, in eminent domain proceedings even though constitutional objections are raised. *Republic Natural Gas* v. *Oklahoma*, 334 U. S. 62; *Grays Harbor Logging Co.* v. *Coats-Fordney Co.*, 243 U. S. 251; *Dieckmann* v. *United States*, 88 F. 2d 902 (7th Cir. 1937).

II.

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The questions presented by this appeal relate to Section 52, Chapter 61, 1935 Colorado Statutes Annotated, as amended. This statute is fully set forth on

pages 3 and 4 of appellant's Statement as to Jurisdiction and is in part as follows:

> "If any corporation formed for the purpose of constructing a road, ditch, reservoir, pipe line, bridge, ferry, tunnel, telephone line, railroad line, electric line or electric plants, shall be unable to agree with the owner, for the purchase of any real estate. . . such corporation may acquire title to such real estate. . . in the manner provided by law for the condemnation of real estate. . . ."

The statute grants the right of eminent domain to certain *corporate* public utilities. It is the contention of appellant that the statute represents unconstitutional class discrimination and denies her equal protection of the law because an individual operating as a public utility is not also granted the right of eminent domain. This contention is without merit and presents no substantial federal question.

The State of Colorado in granting the power of eminent domain to certain corporate public utilities properly recognized and appreciated the many distinctions which exist between corporations and other types of business enterprises, such as perpetuity of existence, greater degree of control by the state, and greater ability to finance large projects. Such classification is not arbitrary, is based upon a reasonable and valid distinction, applies to all within the class, and is reasonable and proper.

In *Los Angeles* v. *Southern California Telephone Company*, 32 Cal. 2d 378, 196 P. 2d 773 (1948), it was contended that a state statute granting to telegraph and telephone companies the privilege to construct their lines along public roads and highways was a

violation of the Constitution because the same privilege was not extended to individuals in the same business. The Supreme Court of California upheld the right of the state to make such a distinction between corporations and individuals and at page 781 the following appears:

> " . . . . There is ample justification for treating corporations differently from individuals in granting franchises for the operation of telephone and telegraph systems, and there is a reasonable basis for the classification of corporations as the sole recipients of the grant offered in section 536. Corporations are in a better position than individuals to finance and carry on statewide projects of this nature, they are more easily regulated and supervised, and they have much greater permanency of existence and can give better assurance of uninterrupted service. It may be that one of the purposes of section 536 was to promote the establishment of statewide communication systems, and the use of corporate ownership and management may have been considered the best method of achieving that purpose."

It must be assumed that this reasoning of the Supreme Court of California represents the settled law of the land on this subject for the appeal from that decision to this Court was dismissed for "want of a substantial federal question." *County of Los Angeles* v. *Southern California Telephone Co.*, 336 U.S. 929.

The conclusive answer to the point of equal protection of the law raised by appellant appears in the case of *Dillingham* v. *McLaughlin*, 264 U. S. 370, where it was held that a failure to grant individuals the same

privilege as is granted to corporations was not a denial of equal protection of the law, since it did not "prevent the plaintiffs from going on with their business if they will subject themselves to the supervision incident to the corporate form." 264 U. S. at 373.

It is fundamental that a state may enact laws granting or denying privileges to specific classes of persons or businesses. The only limitation on such power is that the classification be reasonable and that the law affect all within the class alike. A classification is reasonable if not arbitrarily made, and if, in fact, some valid distinction exists between the class and others. A statute will not be set aside as a denial of equal protection of the law if any state of facts reasonably may be conceived to justify it. *Metropolitan Casualty Insurance Company* v. *Brownell*, 294 U. S. 580; *New York Rapid Transit Corporation* v. *New York*, 303 U. S. 573; *Louisville Gas & Electric Company* v. *Coleman*, 277 U. S. 32; *Quaker City Cab Company* v. *Pennsylvania*, 277 U. S. 389; *Sproles* v. *Binford*, 286 U. S. 374; *State Board of Tax Commissioners* v. *Jackson*, 283 U. S. 527; *Power Manufacturing Company* v. *Saunders*, 274 U. S. 490.

The grouping of corporations in a class as opposed to individuals, partnerships or other business entities engaged in the same type of business has been upheld by this Court as a reasonable classification. *Crescent Cotton Oil Company* v. *State of Mississippi*, 257 U. S. 129. Similarly, the distinction between general corporations and cooperatives has been held to justify classification and different treatment as to each of such classes. *United States* v. *Rock Royal Cooperative*, 307 U. S. 533; *Orient Insurance Company* v. *Daggs*, 172 U. S. 557; *Asbury Hospital* v. *Cass County*, 326 U. S. 207. A classification has often been sus-

tained by this Court with respect to corporations and other business entities engaged in the banking business. *Dillingham* v. *McLaughlin*, 264 U. S. 370; *Noble State Bank* v. *Haskell*, 219 U. S. 104; *Shallenberger* v. *First State Bank*, 219 U. S. 114; *Engle* v. *O'Malley*, 219 U. S. 128. Such classification has likewise been approved with respect to companies engaged in the insurance business. *German Alliance Insurance Company* v. *Lewis*, 233 U. S. 389. The fact that a foreign corporation was not required to post a security bond before appearing and defending an action in the state court while a non-resident individual was so required was held to be a proper classification and not a denial of equal protection of the law. *Owenbey* v. *Morgan*, 256 U. S. 94.

There is no substantial federal question presented for yet another reason. In order for one successfully to attack the constitutionality of the statute on the ground that it denies equal protection of the law, the complaining party must show that he is a member of the class discriminated against and that he has suffered an injury by reason of the failure of the legislature to extend the protection of the statute to the class of which he is a member. Appellant does not allege that she has been denied the right of eminent domain. She complains of the fact that too few have the power to condemn her land rather than too many. Inasmuch as she is not a member of the class denied the right of eminent domain, she cannot have been denied equal protection of the laws. *Sprout* v. *City of South Bend*, 277 U. S. 163; *Rosenthal* v. *New York*, 226 U. S. 260; *Aluminum Company of America* v. *Ramsey*, 222 U. S. 251; *Monamotor Oil Company* v. *Johnson*, 292 U. S. 86; *Dillingham* v. *McLaughlin*, 264

U. S. 370; *Bradley* v. *Public Utilities Commission of Ohio*, 289 U. S. 92.

Appellant states in (c)2 on page 4 of her jurisdictional statement that the Colorado statute "which grants the right to corporate public utilities to condemn private property" is unconstitutional because it permits a taking for a private use by private corporations.

Public Service Company of Colorado is a public utility company under the Public Utilities Act of the laws of the State of Colorado, and is formed for the purpose of constructing electric generating plants and is engaged in that business. The Company provides electric energy for the City and County of Denver and its environs, for 131 other communities, for rural, commercial and industrial customers, and also all or part of the electric requirements of six other utilities and of certain municipally-owned electric systems. The electric requirements of the United States Atomic Energy Commission at Rocky Flats, Buckley Field Naval Air Station, Lowry Air Force Base, the Rocky Mountain Arsenal, and other establishments and facilities of the United States are served by the appellee.

It was alleged that the increasing demands for electric energy required Public Service to construct a new generating plant and that 91.53 acres of the farmlands owned by appellant Miller were necessary for the construction of the new electric plant.

These facts are to be found in the record as a part of the petition in eminent domain. (Exhibit A, Complaint for Relief under Rule 106). They were admitted by appellant's motion to dismiss. *Cook* v. *Denver*, — Colo. —, 265 P. 2d 700 (1954).

The assertion of appellant that the appropriation of her land by this public utility for use as a site for an electric generating plant is not public is so contrary to the settled law on this subject that it needs no extended argument. In the case of *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U. S. 30, it was held that the manufacture and sale of electric energy is public. It was the observation of this Court that "if that purpose is not public, we should be at a loss to say what is". In *Walker* v. *Shasta Power Co.*, 160 Fed. 856, 858, 859 (9th Cir., 1908), a condemnation by a "public service company" for electric power purposes was upheld as a public use.

As recently as November 22, 1954, this Court has again adhered to the salutary principle that when the legislature has declared a use public this declaration is well nigh conclusive. Further, it was stated that this principle controls, even though state legislation is concerned and that it admits of no exception merely because the power of eminent domain is involved. *Berman* v. *Parker*, — U. S. —, 23 U. S. Law Week 4012 (No. 22, Oct. Term 1954).

In Colorado there has been no doubt for over fifty years that the manufacture of electric energy is public. *Lamborn* v. *Bell*, 18 Colo. 346, 32 Pac. 989 (1893); *Public Service Co.* v. *Loveland*, 79 Colo. 216, 245 Pac. 158 (1926). The very decision of the Colorado Supreme Court herein appealed from states in the next to the last paragraph thereof (*Miller* v. *Public Service Co. of Colorado*, — Colo. —, 272 P. 2d 283, 287):

> " . . . In fact, the use of the property here contemplated, cannot be said to be other than a pub-

lic use since the operation of the plant in the furtherance of the conduct of the utility business is for service to the public, and is a business conducted for a public purpose. . . . "

CONCLUSION

Wherefore, appellee Public Service Company of Colorado respectfully submits that the appeal should be dismissed because the decision of the state court below is not a final decision and because the issue presented does not raise a substantial federal question.

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